

PRISON LAW OFFICE
DONALD SPECTER, #83925
SARA NORMAN, #189536
DANIEL B. SIEGEL
General Delivery
San Quentin, CA 94964
Telephone: (415) 457-9144

DISABILITY RIGHTS EDUCATION
AND DEFENSE FUND, INC.
ARLENE MAYERSON
2212 6th Street
Berkeley, CA 94710
Telephone: (510) 644-2555

HOWARD, RICE, NEMEROVSKI,
CANADY, FALK & RABKIN
EVE SHAPIRO, #164709
Three Embarcadero Center, 7th Fl.
San Francisco, CA 94111
Telephone: (415) 434-1600

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN ARMSTRONG, et al.,
Plaintiffs,
v.
PETE WILSON, et al.,
Defendants.

McCUTCHEN, DOYLE, BROWN &
ENERSEN
WARREN E. GEORGE, #53588
JOHN WADSWORTH, #166838
Three Embarcadero Center
San Francisco, CA 94111-4066
Telephone: (415) 393-2000

ROSEN, BIEN & ASARO
MICHAEL W. BIEN, #96891
155 Montgomery St., 8th Floor
San Francisco, CA 94104
Telephone: (415) 433-6830

LAW OFFICES OF ELAINE B.
FEINGOLD
ELAINE B. FEINGOLD, #99226
1524 Scenic Ave.
Berkeley, CA 94708
Telephone: (510) 848-8125

No. C-94-2307-CW

NOTICE OF MOTION AND MOTION
TO MODIFY THE CLASS

Date: January 8, 1999
Time: 10:00 a.m.
Court: Judge Wilken

NOTICE OF MOTION AND MOTION

To all parties and their counsel of record:

PLEASE TAKE NOTICE that on January 8, 1999 at 10:00 a.m. or
as soon thereafter as counsel may be heard in the Courtroom of
the Honorable Claudia Wilken, United States District Judge, 1301
Clay Street, Oakland, California, plaintiffs will and do hereby

1 move for leave to modify the plaintiff class. This motion is
2 made pursuant to Rule 23 of the Federal Rules of Civil Procedure.
3 Plaintiffs also move by way of a separate motion for leave to
4 amend the complaint pursuant to Rule 15 of the Federal Rules of
5 Civil Procedure.

6 RELIEF REQUESTED

7 Plaintiffs request that the Court modify the plaintiff class
8 to include prisoners and parolees with developmental
9 disabilities.

10 MEMORANDUM OF POINTS AND AUTHORITIES

11 **I. INTRODUCTION**

12 On January 13, 1995, this Court found that the Federal Rule
13 of Civil Procedure 23 ("Rule 23") requirements for class
14 certification were met. The Court's Order established a class of
15 present and future California prisoners and parolees with various
16 types of disabilities, including mobility, sight, hearing,
17 learning and kidney impairments.¹ However, plaintiffs have
18 learned through ongoing investigation that another group of
19 disabled prisoners/parolees, those with developmental
20 disabilities, face the same type of problems with defendant as
21 the current class members. Plaintiffs therefore request that the
22 class definition be modified to include these additional disabled
23 prisoners.

24 The modification will allow for the inclusion of new class
25 members represented by David Badillo (California Department of
26

27 ¹ See Plaintiff's Memorandum of Points and Authorities in
28 Support of filing the Second Amended Complaint for additional
case history.

1 Correction ("CDC") No. H49189) and James Simmons (CDC No.
2 C79287), who are developmentally disabled. Mr. Badillo is
3 currently incarcerated at Wasco State Prison Reception Center
4 ("Wasco"). He is 35 years old and has an I.Q. less than 70. He
5 cannot read and has difficulty spelling his own name. CDC
6 clinical staff have concluded that Mr. Badillo is mildly to
7 moderately retarded, describing his cognitive abilities as
8 restricted, poor and simplistic. Because of his disability, Mr.
9 Badillo is unable adequately to comprehend parole proceedings,
10 often attempts to compensate for his disability by pretending to
11 understand others, is influenced by suggestion and cannot
12 adequately represent his own interests. Because of his
13 disability, Mr. Badillo requires assistance from someone
14 knowledgeable about the limitations of a developmentally disabled
15 person's abilities in order to participate as non-disabled
16 inmates do in Board of Prison Term proceedings relating to parole
17 revocation. However, Mr. Badillo has not received the assistance
18 he needs over the course of numerous parole proceedings.

19 Similarly, Mr. Simmons has an IQ less than 70. He is 46 and
20 is currently housed at California Men's Colony. Mr. Simmons has
21 appeared numerous times before the Board of Prison Terms for
22 sentencing and parole consideration, but has been denied
23 reasonable consideration for parole or reduction of his sentence
24 because defendant has, in various ways, refused to accommodate
25 his developmental disability.

26 The Court has the authority to make a modification to the
27 class certification order to include inmates such as Mr. Badillo
28 and Mr. Simmons with developmental disabilities. The Rule 23

1 requirements for class certification will continue to be met.
2 Further, defendant will not be unreasonably prejudiced by the
3 proposed minor modification of the class definition. The Court
4 should therefore modify the class definition to include prisoners
5 and parolees with developmental disabilities.

6 **II. THE COURT SHOULD MODIFY THE CLASS CERTIFICATION ORDER**
7 **TO INCLUDE THE DEVELOPMENTALLY DISABLED.**

8 A. The Court Has The Authority To Modify the
9 Class Order

10 Even after a Rule 23 class certification order is entered,
11 the judge remains free to modify it in light of subsequent
12 developments in the litigation. *General Telephone Company of the*
13 *Southwest v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364, 2372
14 (1982). An order "may be altered or amended before the decision
15 on the merits." Fed. Rule Civ. Proc. 23(c)(1). The Court can
16 modify a class certification order because it is "inherently
17 tentative." *Falcon, supra*, 457 U.S. at 160, 102 S.Ct. at 2372.
18 As there has yet to be either a decision on the merits or notice
19 to class members, modification of the class certification order
20 is still appropriate. See *id.*

21 Plaintiffs request that the Court add developmental
22 disability to the class definition, which includes many other
23 types of disabilities. The current class consists of "all
24 present and future California state prisoners and parolees with
25 mobility, sight, hearing, learning and kidney disabilities that
26 substantially limit one or more of their major life activities,
27 except those prisoners with mobility impairments housed at the
28 California Medical Facility." See Order dated January 13, 1995.

1 There is no question that those with a developmental
2 disability require a similar degree of assessment and
3 accommodation by defendant as prisoners/parolees with learning
4 disabilities, which are already included in the class definition.
5 Decl. of Nancy Cowardin, ¶¶ 5, 7-9. The learning disabled have
6 normal intelligence but an impaired ability to understand or use
7 language, while the developmentally disabled have a lower level
8 of intelligence. Cowardin decl., ¶¶ 2-5. Both of these
9 disabilities involve impairment of mental ability. Cowardin
10 decl., ¶¶ 2-5. Both groups require similar assessments and
11 assistance by someone with knowledge of their disability in order
12 to have the same opportunity to participate in Board of Prison
13 Term proceedings as non-disabled inmates and parolees. Cowardin
14 decl., ¶¶ 7-9. The developmentally disabled are therefore just
15 as in need of a remedy due to defendant's discrimination as the
16 learning disabled.

17 B. The Requested Modification Will Not Alter The
18 Court's Finding That The Rule 23 Requirements
 Are Met

19 The addition of developmental disability to the list of
20 disabilities in the class definition does nothing to alter the
21 Court's finding that the Rule 23 requirements for class
22 certification are met. In fact, the Northern District has
23 already found that these requirements were met for a class
24 consisting solely of developmentally disabled California
25 prisoners in a disability lawsuit not involving defendant. See
26 Exh. A (*Clark v. State of California, et al.*, No. C 96-1486 FMS
27 (February 26, 1997) (Order Granting Motion For Class
28 Certification)).

1 The proposed modification meets the Rule 23(a)(1)
2 requirement that the number of plaintiffs be so numerous that
3 joinder of all members is impracticable. The addition of the
4 developmentally disabled only adds to the numbers already found
5 adequate by this court. However, even a class consisting solely
6 of developmentally disabled prisoners has been found to meet the
7 numerosity requirement. See *id.* As courts have held that as few
8 as fifty inmates sufficiently satisfy the numerosity requirement,
9 there can be no question that this requirement is met here. See
10 *Inmates of Lycoming County Prison v. Strode*, 79 F.R.D. 228, 231
11 (M.D. Pa. 1978).

12 The proposed modification still meets the Rule 23(a)(2)
13 requirement that questions of law and fact be common to all
14 members of the class. The developmentally disabled share the
15 same issues as the other class members, including the standards
16 of relief under the Americans With Disabilities Act, 42 U.S.C. §§
17 12101 *et seq.*, and Section 504 of the Rehabilitation Act of 1973,
18 29 U.S.C. §794. The developmentally disabled also share the same
19 issue under these acts as to whether their impairments
20 substantially limit one or more of their major life activities.
21 In addition, they share the issue of whether defendant
22 impermissibly discriminate against them due to their disability.
23 This discrimination includes the failure to make individualized
24 assessments of disabled prisoners' ability to meaningfully
25 participate in the hearings conducted by defendant.

26 The Rule 23(a)(3) requirement that the claims of the
27 representative parties are typical of the claims of the class
28 also would continue to be met under the modified definition.

1 Plaintiff David Badillo is currently housed at Wasco State Prison
2 Reception Center and is developmentally disabled. Plaintiff
3 James Simmons is currently housed at California Men's Colony.
4 Defendant failed to provide reasonable modifications for their
5 disability at each of their parole hearings. As with the other
6 class members in this case, Mr. Badillo and Mr. Simmons have
7 suffered deprivations stemming from defendant's deficient,
8 system-wide policies and procedures concerning individuals with
9 disabilities. By challenging these policies and procedures, the
10 entire class will benefit from their action. See *Ellis v. Naval*
11 *Air Rework Facility Alameda, California*, 404 F.Supp. 391, 396
12 (N.D. Cal. 1975) (Rule 23(a)(3) met where all class members would
13 benefit), *rev'd on other grounds*, 608 F.2d 1308 (9th Cir. 1979).
14 In addition, all of Mr. Badillo's and Mr. Simmons' claims for
15 relief are based on the defendant's violation of the ADA and
16 Section 504, just like the other class members. See *Penn v. San*
17 *Juan Hospital, Inc.*, 528 F.2d 1181, 1189 (10th Cir. 1975) (fact
18 situations may vary if all claims based on same legal or remedial
19 theory). Therefore, the typicality requirement is met.

20 Under Rule 23(a)(4), the representative parties must fairly
21 and adequately protect the interests of the class. This
22 requirement continues to be met since Mr. Badillo's and Mr.
23 Simmons' interest in bringing defendant's policies and practices
24 up to lawful statutory standards is coextensive with and not
25 antagonistic to the interests of the other class members who are
26 being or will be subjected to the same policies and practices.
27 See *Noren v. Straw*, 578 F. Supp. 1, 3 (D. Mont. 1982) (named
28 plaintiffs, adult male prisoners, fairly represented interests of

1 females and juveniles for claims of violations of privacy). In
2 addition, the Court has already found plaintiffs' counsel to be
3 fully competent to prosecute the action as a class action. See
4 Order dated January 13, 1995. The Rule 23(a)(4) requirements are
5 therefore met.

6 The proposed modification also has no impact on the Court's
7 previous finding that three of the Rule 23(b) criteria are met,
8 although only one needs to be fulfilled. First, the prosecution
9 of separate actions by individual members of the class would
10 still create a risk of inconsistent or varying adjudications with
11 respect to individual members of the class which would establish
12 incompatible standards of conduct for the party opposing the
13 class. Rule 23(b)(1)(A). Second, adjudications with respect to
14 individual members of the class would still as a practical matter
15 be dispositive of the interests of the other members not parties
16 to the adjudications or substantially impair or impede their
17 ability to protect their interests. Rule 23(b)(1)(B). Third,
18 defendant has still acted or refused to act on grounds generally
19 applicable to the class, making final injunctive relief
20 appropriate with respect to the class as a whole. Rule 23(b)(2).
21 All of the Rule 23 requirements therefore continue to be met.

22 C. Defendant Is Not Unreasonably Prejudiced By The
23 Modification To The Class Definition

24 As with the amendment to the complaint, the proposed
25 modification to the class order will not unreasonably prejudice
26 defendant. In fact, there is no prejudice to defendant. To
27 date, besides general contention interrogatories that plaintiffs
28 have yet to respond to, defendant has not conducted any

1 discovery. Plaintiffs will respond to these interrogatories.
2 Plaintiffs understand that defendant intends to depose plaintiffs
3 and members of the plaintiff class. Plaintiffs intend to
4 cooperate with defendant on these depositions and make available
5 the substitute plaintiffs. Plaintiffs will, of course, make Mr.
6 Badillo and Mr. Simmons available for deposition as well. In
7 short, since very little discovery has been conducted to date and
8 plaintiffs will waive the discovery cut-off for further
9 depositions, defendant will not be prejudiced by a modification
10 of the class.

11 **III. CONCLUSION**

12 For the foregoing reasons, plaintiffs request that the Court
13 amend the January 13, 1995 class certification order to include
14 developmentally disabled prisoners and parolees among the class
15 members.

16 Dated: December 3, 1998

17 PRISON LAW OFFICE

18
19 By: Donald Specter
20 Donald Specter
21 Attorney for Plaintiffs
22
23
24
25
26
27
28

EXHIBIT A

ORIGINAL
FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FEB 26 1997

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DERRICK CLARK, et al.)
)
Plaintiffs,)
)
vs.)
)
STATE OF CALIFORNIA, et al.)
)
Defendants.)
)

No. C 96-1486 FMS

ORDER GRANTING
MOTION FOR CLASS
CERTIFICATION

Plaintiffs' motion for class certification was heard before the Honorable Fern M. Smith on February 21, 1997. Plaintiffs and defendants were represented by their respective counsel of record. The Court, having read the papers and the pleadings on file herein, has found good cause to grant plaintiffs' motion for class certification. After considering the moving and opposition papers, the arguments of counsel, and all other matters presented to the Court, the Court makes the following findings of fact:

A. The prerequisites to maintenance of class action set forth in Federal Rule of Civil Procedure 23(a) (1-4) are met:

(1) The class of all present and future individuals with developmental disabilities who are under the control of the California Department of Corrections is so numerous that joinder of all members is impracticable;

(2) There are questions of law and fact common to all members of the class;

(3) The claims of the representative parties are typical of the claims of the class; and

1 (4) The representative parties will fairly and
2 adequately protect the interests of the class.

3 B. A class action is maintainable under Federal Rule of
4 Civil Procedure 23(b)(2) in that:

5 In maintaining its current policies and practices with
6 respect to prisoners with developmental disabilities, defendants
7 have acted or refused to act on grounds generally applicable to
8 the class.
9

10 Plaintiffs' motion for class certification is therefore
11 GRANTED. The class shall consist of all present and future
12 individuals with developmental disabilities who are under the
13 control of the California Department of Corrections. The term
14 "developmentally disabled" is applied and used as defined in
15 California Welfare & Institutions Code section 4512(a).

16 SO ORDERED.

17 Dated: February 26, 1997

18 
19

20 FERN M. SMITH
21 United States District Judge
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE BY MAIL

I, Suddie E. Scott, hereby declare:

1. I am over the age of 18 years and am not a party to the within cause. I am employed by Pillsbury Madison & Sutro LLP in San Francisco, California.


2. My business address is 235 Montgomery Street, San Francisco, California. My mailing address is P.O. Box 7880, San Francisco, CA 94120-7880.

3. On December 4, 1998, I served a true copy of the attached document titled exactly NOTICE OF MOTION AND MOTION TO MODIFY THE CLASS; NOTICE OF MOTION AND MOTION TO AMEND COMPLAINT; DECLARATION OF NANCY COWARDIN, Ph.D., IN SUPPORT OF PLAINTIFFS' MOTION TO AMEND COMPLAINT AND MODIFY CLASS; [PROPOSED] ORDER GRANTING PLAINTIFFS' MOTIONS TO AMEND THE COMPLAINT AND MODIFY THE CLASS by placing it in a sealed envelope and depositing it in the United States mail, first class postage fully prepaid, addressed to the following:

George D. Prince
Deputy Attorney General
Office of the Attorney General
50 Fremont Street, Suite 300
San Francisco, CA 94105-2239

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 4th day of December, 1998, at San Francisco, California.



Suddie E. Scott